Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Richard B. Brozo,

Petitioner,

v.

Oracle Corporation, a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit, sitting in diversity, improperly applied its own federal common law, rather than the substantive law of the state of Minnesota, contrary to the Rules of Decision Act, 29 U.S.C. § 1652, and in violation of the uniform holdings of this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Steele v. General Mills*, 329 U.S. 433 (1947)?

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Petitioner Richard B. Brozo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 324 F.3d 661 and is reproduced in the appendix of this petition at (A-1.) The order of the court of appeals denying Brozo's petition for a rehearing en banc or by the panel is unreported and reproduced in the appendix of this petition at (A-23.) The order of the United States District Court denying Oracle's motion for a judgment as a matter of law or a new trial is unreported and reproduced at (A-26.) The order of the United States District Court entering judgment on a jury verdict for *Brozo* is unreported and reproduced in the appendix of this petition at (A-40.)

JURISDICTION

The order of the court of appeals denying Brozo's petition for rehearing and for rehearing en banc was entered on June 24, 2003. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1652 of Title 29 of the United States Code Provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

FACTS AND PROCEDURAL HISTORY

Respondent hired Petitioner as a sales representative in 1998. (A-2) Petitioner, an accomplished computer salesperson with more than thirty years experience in the field, signed a compensation agreement comprised of an individual compensation plan, and a document entitled "License Sales Terms and Conditions" in June of 1999 (together these documents constituted the Commission Plan (the "Plan")). (*Id.*) When hired in August of 1998, Petitioner was shown a copy of the individual compensation plan with a graduated commission schedule. (*Id.*) Petitioner first saw the License Sales Terms and Conditions document *following* the transaction at issue here.

The individual compensation plan set forth a cap on bonuses, but not on commissions. (A-9, 14.) Along with twelve single-spaced pages of detailed rules for calculating commissions, the License Sales Terms and Conditions stated that commissions may be earned "based upon the attainment of quota and revenue goals." It also contained certain other provisions that 1) allowed the company to change the Plan at any time as to "salaries, bonuses or commissions," 2) stated that bonuses or commissions do not vest until the Company makes final changes "as authorized by the Plan," and 3) further stated that large transactions would be "reviewed" by upper management for "appropriate treatment under the Plan." (A-2, 4.)

Petitioner was specifically hired to work on a sale known as the "Fingerhut deal." (A-5.) Petitioner was the "lead person" on the Fingerhut deal, which required of him hundreds of hours over a period of many months. (*Id.*) When the Fingerhut deal was completed, Petitioner earned slightly more than a $10 million quota credit for the Fingerhut deal and accordingly earned a commission of $787,838 under the terms of the Plan. (*Id.*) However, after the Fingerhut

transaction closed, a personal conflict arose between Petitioner and his supervisor, Reed Olson ("Olson"). (A-5.) Petitioner played a practical joke on Olson while they were on a fishing trip, which Olson found embarrassing. (A-6.) One of Respondent's salespeople, who had been involved in the practical joke, testified that Olson said he was going to teach Petitioner a lesson by reducing Petitioner's commission on the Fingerhut deal. (*Id.*) A few days after the fishing trip, Olson sent an e-mail to his supervisor, Mike Rosser, in which he recommended that Petitioner's commission for the Fingerhut deal be reduced. (*Id.*) Subsequently, Respondent made a retroactive "manual" adjustment and reduced Petitioner's earned commissions by $604,249 for fiscal year 1999. (*Id.*) The amount of the retroactive manual adjustment was based on Olson's mistaken belief that Petitioner's commission would be over two million dollars for the Fingerhut deal.

Petitioner sued Respondent in the United States District Court for the District of Minnesota with jurisdiction based on 28 U.S.C. § 1332. (A-2, 5) Petitioner pursued state law claims to recover his unpaid commission under Minnesota Statute 181.13. A jury found for Petitioner, and Respondent appealed to the Eighth Circuit. The Eighth Circuit reversed the district court's denial of Respondent's motion for summary judgment finding that "under our [the Eighth Circuit's] precedents" a court may only review contract terms in cases of "fraud, bad faith, or a grossly mistaken exercise in judgment." (A-12.) The Eighth Circuit did not cite to any Minnesota case for this statement of law, relying exclusively on a previous Eighth Circuit decision in *Vigoro Industries v. Crisp*, 82 F.3d 785 (8th Cir. 1996). (*Id.*) *Vigoro* held, in pertinent part, that when a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable. 82 F.3d at 791. At most, courts will step in when the party who would assume the role of sole

arbiter is charged with fraud, bad faith, or a grossly mistaken exercise of judgment. *Id.*

Senior Circuit Judge Lay vigorously dissented from the majority opinion stating

> This case troubles me as much as any case that I have sat on in over thirty seven years on this court...to deny a party a commission properly earned under the express terms of a contract in the manner the majority has attempted to in this case, requires strong words and a strong objection. I accordingly strongly dissent.

Brozo, 324 F.3d at 672. Judge Lay properly observed that "[T]he majority overlooks Minnesota law which controls an interpretation of the contract." *Id.* at 670 n.3. The dissent characterized the majority's interpretation, which allowed Respondent to use its compensation plan to retroactively alter earned commissions, as both unjust and nonsensical. *Id.* at 672.[1] Citing to *Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock*, Minn., 282 Minn. 477. 479-80, 165 N.W.2d 554, 556 (1969), the dissent observed that the

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[1] Respondent confirmed that it held this nonsensical view of its compensation plan during the following exchange with the trial court.

The Court: I have a hard time seeing that this is designed to say that basically, individually you can sit down and at any time during the course of the year [and] change somebody's salary. Is it your position they could change it retroactively?

Respondent's attorney: Absolutely.

majority's interpretation of the contract directly contravened Minnesota law that a contract should not be construed so strictly as to lead to a harsh or absurd result. *Id.* at 671.

Petitioner petitioned the Eighth Circuit for a rehearing by the panel or en banc. That petition was denied with Judge Melloy voting for rehearing en banc. (A-23) Judge Lay dissented from the denial of the petition for panel rehearing noting that

> For this court to now alter a commission on a retroactive basis, after the commission has been earned, is not only totally unjust, but ignores the landmark decision of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The majority holding constitutes fundamental error and should be reversed.

A022. This petition for writ of certiorari followed.

ARGUMENT

I. The Eighth Circuit's Holding Merits Summary Reversal.

The Eighth Circuit's decision, by applying its "precedents," rather than Minnesota substantive law, is ripe for summary reversal. Summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J. dissenting). Here, both the *Erie* doctrine and Minnesota contract law are settled and stable, the material facts are not in dispute, and the decision below is clearly in error. Therefore summary reversal is appropriate.

The Law is well settled since *Erie* was decided in 1938, that federal courts sitting in diversity are obliged to follow state substantive law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). The interpretation of private contract interpretation is a matter of state law. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S.Ct. 1248, 1253, 103 L.Ed.2d 488 (1989). The Eighth Circuit did not apply Minnesota state law but instead relied its own "precedents," i.e., a federal common law, stating that only in circumstances where there was "fraud, bad faith, or a grossly mistaken exercise in judgment" would a court examine the discretionary terms of a contract. *Brozo*, 324 F.3d at 667. As the Minnesota Attorney General noted in an amicus letter to the Eighth Circuit, "Minnesota Courts have frequently reviewed contracts on standards other than fraud, bad faith, or grossly mistaken conduct."[2] The Eighth Circuit's application of its own federal common law at the expense of Minnesota contract law is expressly prohibited by the *Erie* doctrine. *See* Martin H. Redish, Erie and The Rules of Decision Act, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (2d ed. 1990); Paul J. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision, 105 U. Pa. L. Rev. 797 (1957). Summary reversal is appropriate.

The Eighth Circuit's departure from *Erie* mimics that of the Fifth Circuit in *Steele v. General Mills*, 329 U.S. 433, 67 S.Ct. 439 (1947). In *Steele*, the plaintiff filed suit against General Mills for commissions earned as a carrier of goods. Under Texas statutes, the plaintiff was entitled to minimum commissions, but had entered a contract with General Mills for less. Sitting in diversity, the district court judge instructed the jury to find for the plaintiff for the difference between the contract and the statute amount in accordance with Texas law.

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[2] The amicus letter is attached to Petitioner's appendix at A-43.

The Fifth Circuit Court of Appeals reversed, finding that because both parties entered into the contract knowing that the contract was illegal, the doctrine of *pari delicto* controlled. *Steele*, 329 U.S. at 437, 67 S.Ct. at 442.

This Court disagreed. *Steele,* 329 U.S. at 441, 67 S.Ct. at 443. Justice Black, writing for a unanimous Court, held that the duty to pay the minimum commissions was a public duty under Texas law. *Id.* General Mills breached this public duty by paying less than the statutory minimum. *Id.* The Court reasoned that because General Mills breached its public duty and because Texas law dictated that *pari delicto* did not apply to transportation commission cases, the Fifth Circuit erred by finding otherwise. *Id.*

> Application of the doctrine of *pari delicto* in this proceeding, therefore, where the federal court has jurisdiction by reason of diversity, would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts.

Steele, 329 U.S. at 441, 67 S.Ct. at 443.

Like the Fifth Circuit in *Steele*, the Eighth Circuit held that once Petitioner earned commission under state statutes and state common law, Respondent could lower the earned commission at its discretion. This holding is contrary to Minnesota law. The Minnesota Supreme Court has specifically held that such a reservation of an employer's right to change or modify a contract does not mean that an employer may change the terms of the contract after performance. *Feges v. Perkins*, 483 N.W.2d 701, 708 (Minn. 1992). In *Feges*, the Minnesota Supreme Court held: "An offeror of a unilateral contract always retains the power to modify or revoke the offer as long as the offeree has not

begun performance . . . but retention of that power does not preclude the offer from becoming a contract once accepted by the offeree by tender of performance." *Id.* (citing *Sylvestre v. State*, 298 Minn. 142, 147 214 N.W. 2d 658, 667 (1973)). Therefore, the retention by the employer of the right to change a contract of employment does not preclude the offer from becoming a binding contract, "once accepted by the offeree by tender of performance." *Id.* at 708. It is undisputed that Petitioner performed. Minnesota law is clear that once an employee performs an employer must pay the employee.[3] The Eighth Circuit's decision below is contrary to Minnesota law and should be reversed.

This petition satisfies the remainder of the summary reversal elements. The material facts are not in dispute. Indeed, both parties moved for summary judgment before the district court. The Eighth Circuit's failure to apply Minnesota law is clearly in error.

Additionally, the panel erred in basic contract interpretation. The dissent characterized the majority's contract interpretation as "blatant error." *Brozo*, 324 F.3d at 668. The dissent continued:

> Although the majority gives lip service to the fact that the contract expressly provides that only bonuses may be capped, it gives little meaning to this significant language. There is no language in the contract that says a commission, after it has been earned, may be capped. The fact that the

[3] As pointed out in the Minnesota Attorney General's letter to the Eighth Circuit, Minnesota public policy and statutes unmistakably state that once an employee earns compensation, the employer must pay it. *See* Minn. Stat. §§ 181.03 subd. 2, 181.08, 181.10, 181.101, 181.13, 181.14, and 181.15.

> contract provides only for bonuses to be capped and not commissions is given little or no weight by the majority. This in itself is significant error. The majority has found a way to cap Brozo's commission by taking language in the contract completely out of context.

Id. at 669. The dissent listed six basic tenets of contract interpretation that the majority ignored. *See Id.* at 668-672. These ignored tenets include 1) considering all of the facts and circumstances, including the conduct of the parties, surrounding the contract and the reliance that the parties have placed upon it. *See* Restatement Second of Contracts § 202; *see also* 11 Richard A. Lord, Williston on Contracts § 32:2, at 402 (4th ed. 2000); 2) giving a coherent and consistent meaning to all terms in the contract. *See Lord*, supra, at § 32:3, at 408; 3) that interpretation of a contract should be reasonable and not arbitrary or capricious and should reflect a just result. *See id.* at § 32:11; 4) that the meaning of words in a contract depends upon the words around it. *Lord, supra,* at § 32:6, at 432-34; 5) that every contract should be interpreted to provide a lawful and legal meaning. *Lord, supra,* at § 32:11, at 453; and 6) that a court must construe the agreement against the drafter. 11 *Lord, supra,* at § 32:12, at 472.

The Eighth Circuit should have applied *Erie* in this case and used Minnesota law to interpret Petitioner's compensation plan. By ignoring *Erie* the Eighth Circuit departed from stable and settled law. The facts are not in dispute and the decision below was clearly in error both in interpreting the contract at issue and in ignoring *Erie*. Summary reversal is appropriate.

II. The Eighth Circuit Has Split From the Other Circuits by Applying a Federal Common Law to State Law Claims.

Should the Court decide that summary reversal is not appropriate, this petition should still be granted because the Eighth Circuit has split with its fellow circuits over application of *Erie*. Indeed, both this decision and *Vigoro*, used almost exclusively by the panel below to justify its holding, are dramatic departures from the fundamental principle established in *Erie* and as applied by every other circuit.

"Except in matters governed by the Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the state*." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938) (emphasis added). Not surprisingly, in light of the clarity of this decision, the application of *Erie* by other circuit courts directly conflicts with that of the Eighth Circuit in this case. "In a diversity case, a federal court applies federal procedural but state substantive law. Rules of contract interpretation are treated as substantive to avoid driving a wedge between state and federal diversity contract cases." *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998) (citing *Erie*); *Cloud v. Trustees of Boston University*, 720 F.2d 721 (1st Cir. 1983); *State of New York v. Blank*, 27 F.3d 783, 788 (2d Cir. 1994); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir. 1960); *Courtaulds North America, Inc. v. North Carolina National Bank*, 528 F.2d 802 (4th Cir. 1975); *Amica Mutual Ins. Co. v. Moak*, 55 F.3d 1093 (5th Cir. 1995); *Vencor, Inc. v. Standard Life and Acc. Ins. Co.*, 317 F.3d 629 (6th Cir. 2003); *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1997); *Moundridge Miling Co. v. Cream Of Wheat Corp.*, 105 F.2d 366 (10th Cir. 1939); *Technical Coating Applicators, Inc. v. U.S. Fidelity & Guar. Co.*, 157 F.3d 843 (11th Cir. 1998); *Hershon v. Gibraltar Bldg. &*

Loan Ass'n, Inc., 864 F.2d 848 (D.C. Cir. 1989); *see also Transcontinental & Western Air v. Koppal*, 345 U.S. 653, 657, 73 S.Ct. 906, 908 (1953) (holding that if a contract is not governed by the Railway Labor Act, it would be governed by state law). The purpose of *Erie* is to ensure that federal courts follow state substantive law to create uniformity between state and federal courts in order to avoid the obvious constitutional problems created prior to *Erie*. *See Erie*, 304 U.S. at 74-75, 77-78, 58 S.Ct. 817. The Eighth circuit, by relying on its own precedents in clear violation of *Erie*, has thwarted this purpose.

A. By Departing From *Erie* and Relying on *Vigoro*, the Eighth Circuit Ignored Minnesota Law.

In holding that Respondent could retroactively alter compensation after the employee had completed performance and the employee earned the compensation, the majority's opinion ignores longstanding Minnesota precedent that holds (1) once an offeree performs under a unilateral contract, a binding contract exists which the offeror may not revoke, and (2) employees are entitled to earned compensation.

1. Respondent could not revoke or change its offer after Petitioner's performance.

As the dissent tersely stated, "The majority's opinion states that an employer can change an employee's compensation after the employee's work is completed and the compensation is earned. I challenge the majority to find any contract that has ever been interpreted in such a nonsensical way." *Brozo*, 324 F.3d at 669. The majority did not, and indeed could not, rise to the challenge. Since at least 1902, the Minnesota Supreme Court has held that the offeror of a unilateral contract may not alter the contract once performance has begun. *Lapam v. Flint*, 86 Minn. 376, 90

N.W. 780 (Minn. 1902); *Sylvestre v. State*, 298 Minn. 142, 157, 214 N.W.2d 658, 667 (Minn. 1973) ("If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract"). As the *Sylvestre* court noted: "it is not consonant with American tradition of fairness and justice to change the ground rules in the middle of the game." 298 Minn. at 153, 214 N.W.2d at 665.

Courts have repeatedly applied this fundamental principle of contract law to the employment setting. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn. 2000) ("[T]he basis for a unilateral contract ... can relate to such matters as bonuses, severance pay or commission rates ..."); *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 883 (Minn. 1986) (A promise of employment on particular terms, if presented in the form of an offer and accepted by employee, will create a binding unilateral contract.); *Hartung v. Billmeier*, 243 Minn. 148, 151, 66 N.W.2d 784, 788 (1954) ("Plaintiff's offer was converted into a contract when he continued his employment for the full five-year period.").

Here, Respondent offered to pay Petitioner a specified commission if he made the Fingerhut sale. Petitioner accepted that offer by closing the deal. Under Minnesota law, Respondent could not change the terms of its offer after Petitioner had begun, let alone after Petitioner had completed performance. *Feges*, 483 N.W.2d at 708 (Minn. 1992). Indeed, under Minn. Stat. §§ 181.13 and 181.14 subd. 1, Petitioner was entitled to receive his earned commission.[4]

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[4] Minn. Stat. §181.13 states, in relevant part:
When any person, firm, company, association, or corporation employing labor within this stated discharges a servant or employee, the wages **or commissions** actually earned and unpaid at the time of discharge shall

Therefore, the majority erred in ignoring fundamental principles of Minnesota contract and statutory law by holding that Respondent could alter Petitioner's commission after performance. By ignoring Minnesota law in favor of its own precedents, the Eighth circuit has split from all other circuit courts in its application of (or, rather, in its refusal to apply) the *Erie* doctrine.

2. Respondent could not reserve the right to amend or modify its agreement with Petitioner after performance.

The majority emphasized the fact that the Plan gives Respondent the discretionary authority to decide "appropriate treatment ... under the Plan" for Petitioner's commission payment. Under this logic, Respondent had the right to reduce compensation, even after it was earned.

As discussed *supra*, the Minnesota Supreme Court has specifically held that such a reservation of an employer's right to change or modify a unilateral contract does not mean that an employer may change the terms of the contract after performance. *Feges*, 483 N.W.2d at 708 (Minn. 1992). Therefore, the Eighth Circuit ignored Minnesota law, which holds that once performance has been completed a contract cannot be retroactively modified to alter the benefit of the bargain in favor of the offeror. *Id.* Thus the Eighth Circuit departed from every other circuit by rejecting *Erie*'s command to follow state substantive law.

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become immediately due and payable upon demand of the employee. (emphasis added)

Minn. Stat. §181.14 Subd. 1 states:

"When any such employee quits or resigns employment, the wages or commissions **earned and unpaid** at the time the employee quits or resigns **shall be paid in full.** (emphasis added)

3. Minnesota employees are entitled to earned compensation.

Under Minnesota law, entitlement to commissions turns on the central question of when compensation is earned. *Holman v. CPT Corporation*, 457 N.W.2d 740 (Minn. Ct. App. 1990). "[W]hen the services are rendered, the right to secure the promised compensation is vested." *Brown v. Tonka Corp.*, 519 N.W.2d 474, 477 (Minn. Ct. App. 1994) (Employee was entitled to accrued, unused vacation pay because his right to it had vested); *see also Tynan v. KSTP*, Inc. 247 Minn. 168, 177, 77 N.W. 2d 200 (1956); *see also* Minn. Stat. § 181.13 (statutory right to commissions "actually earned"). There is no dispute that Petitioner earned the commission at issue. Respondent's Regional Manager admitted that commissions were earned no later than the date on which a contract with a customer was booked. The Fingerhut deal closed in May of 1999, and there is no dispute that Petitioner received the quota credit entitling him to his claimed commission under the Plan. As such, Petitioner had completed his services to Respondent on the Fingerhut deal. His commission had been earned, and he had secured, pursuant to Minnesota law, a vested right to receive the commission. *Brown*, 519 N.W.2d at 477; Minn. Stat. § 181.13. The Eighth Circuit's disregard of these fundamental principles of Minnesota law, in violation of *Erie*, necessitates that this petition be granted.

B. The Eighth Circuit's Reliance on *Vigoro* Is Misplaced, as *Vigoro* Also Violated the *Erie* Doctrine.

The decision in this case is not an isolated event. The case the majority found dispositive, *Virgoro*, also ignored *Erie*. In *Vigoro*, a diversity case in Arkansas, a former employer brought suit against a former employee for a variety of issues related to the employee's founding a competing

PUBLISHER'S NOTE:

Page(s) 15 missing in original.

By applying case law with no precedential value in Minnesota to a claim under Minnesota law, the Eighth Circuit has effectively subverted the purpose of the *Erie* doctrine and reached a result that directly contrasts with Minnesota statutory law, common law, and public policy. Therefore the decision of the Eighth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX INDEX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1309

Richard B. Brozo,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
	*	District Court for the
	*	District of Minnesota
Oracle Corporation,	*	
a Delaware corporation,	*	
	*	
Appellant.	*	

Submitted: October 9, 2002

Filed: March 28, 2003

Before McMILLIAN, LAY and RILEY, Circuit Judges.

McMILLIAN, Circuit Judge.

Oracle Corporation (Oracle) appeals from a final judgment entered after a jury trial in the United States District Court for the District of Minnesota, awarding Richard B. Brozo damages in the amount of $604,249.00 on his breach of contract claim. Brozo v. Oracle Corp., No. 00-751 (D. Minn. Oct. 17, 2001) (judgment). For reversal, Oracle argues that the district court erred in holding that the contract at issue is ambiguous and, alternatively, erred in its instructions to the

jury. For the reasons stated below, we reverse the judgment of the district court and remand the case to the district court for further proceedings consistent with this opinion.

Jurisdiction was proper in the district court based upon 28 U.S.C. § 1332. Jurisdiction is proper in this court based upon 28 U. S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

Background

Oracle, a Delaware corporation with its principal place of business in Redwood Shores, California, develops, manufactures, markets, and distributes computer software and related products and services. In 1998, Oracle hired Brozo, a Minnesota resident, as a sales representative. Oracle informed Brozo that, in addition to his annual base salary of $91,800, he was entitled to receive commissions based in part upon his sales. The terms and conditions under which he was to earn salary, commissions, and bonuses were set forth in two documents entitled "Fiscal Year 1999 Oracle Americas Compensation Plan" and "License Sales Terms and Conditions" (together referred to as "the Plan"). Under the Plan, Brozo's commissions were to be calculated based upon a predetermined "annual quota," the number of "quota credits" he earned, and variable rates at which the commissions would be calculated. The Plan provides in relevant parts:

> A Compensation Plan ("the Plan") consists of (1) this document ("Compensation Plan Terms and Conditions") and (2) the individualized Compensation Plan. Acceptance of any commissions and/or bonuses payable under this Plan indicates acceptance of the Plan. This Plan covers the 1999 Fiscal Year from June 1, 1998 through May 31, 1999.

Oracle agrees to:

- Pay compensation under the terms of the Compensation Plan.

The employee agrees to:

- Accept as full compensation the compensation paid pursuant to the Compensation Plan.

* * * *

1. Definitions

* * * *

C. Commissions - Commissions may be earned based upon the attainment of quota and revenue goals.

* * * *

II. Administration

A. The Company shall make the final and binding determination of any amount payable under the Plan and reserves the right to change the Plan at any time, during or after the close of the fiscal year. Changes may be to salaries, bonuses, commissions, commission rates, quotas, territories or any other terms and conditions. Changes to the Plan are valid only if approved at the Vice President level or higher in accordance with Sales Planning practices. Entitlement to commissions and bonuses does not vest until the Company makes any and all final changes as authorized by the Plan.

B. For any single transaction that generates Quota Credit equal to or greater than the salesperson's annual quota, management at the Vice President level or

higher will review the transaction and determine the appropriate treatment of the transaction under the Plan.

C. The Executive Vice President, Americas, or the Executive Vice President, Worldwide/US Services Management shall have the final responsibility, authority and discretion in all matters of administration or interpretation of the Plan.

Addendum to Brief for Appellant at 18-19 (Defendant's Exhibit 101) (Fiscal Year 1999 Oracle Americas Compensation Plan, License Sales Terms and Conditions). It is undisputed that the Plan was a binding contract between Oracle and Brozo for the period of Brozo's employment.

Brozo was hired by Oracle in October 1998, four months into the 1999 fiscal year. At the time of his hire, Oracle was pursuing a sale of application software to Fingerhut Corporation (Fingerhut). Brozo was hired with the understanding that he would work on the Fingerhut deal, which he did. On May 31, 1999, Oracle and Fingerhut closed the deal, a multi-million dollar application software agreement. Brozo was initially given a "quota credit" for the Fingerhut transaction in excess of $10 million. That quota credit would have generated a commission of nearly $1 million. To address that matter, Oracle subsequently decided to cap Brozo's total quota credits far the 1999 fiscal year at 200% of his pro-rated annual quota, which in effect capped his commissions. Consequently, his commissions for fiscal year 1999 were approximately $600,000 less than they would have been with the $10 million-plus quota credit. Brozo resigned on November 29, 1999. His total compensation for the eight months of his employment in fiscal year 1999 totaled approximately $420,000 in salary and commissions.

Brozo brought the present action alleging breach of contract and related claims. In his complaint, Brozo claimed that Oracle owed him "substantial commissions," based upon the commission he allegedly earned, but was not fully paid, for the Fingerhut deal. Appellant's Appendix at 2-3 (complaint TT 5-10). Brozo also alleged in the complaint that, when his supervisor, Reed Olson, told him that his commission for the Fingerhut transaction was being capped, Olson gave the following reasons: "[he] had not been `on board long enough' at Oracle; [he] allegedly had not `worked hard enough' on the final approval of the contract wording with Oracle's internal Legal and Revenue Recognition departments; and Oracle allegedly had the right to `cap' a commission previously earned by a salesperson." Id. (T 8).

The parties filed cross-motions for summary judgment, asserting entitlement to judgment as a matter of law based upon terms of the Plan which they argued unambiguously supported their respective positions. The district court denied the parties' summary judgment motions. The district court explained: "the documents relied upon by the parties in support of their respective summary judgment motions are ambiguous; that is, they are susceptible of more than one meaning." Brozo v. Oracle Corp., No. 00-751 (July 26, 2001) (order).

At trial, Brozo presented evidence to show that, before he was hired by Oracle, he was a highly successful salesperson with over thirty years of experience; that he was specifically hired to work on the Fingerhut deal; and that he became the "lead person" on the Fingerhut transaction, which required of him hundreds of hours over a period of many months. Brief for Appellee at 7-8. He earned a $10 million-plus quota credit for the Fingerhut deal and accordingly earned a commission of approximately $1 million under the terms of the Plan. However, after the Fingerhut transaction closed, a personal conflict arose between him and Olson.

According to Brozo, he had played a practical joke on Olson while they were on a fishing trip, which caused Olson some embarrassment. Phil Ward, another Oracle salesperson who had been involved in the practical joke, testified that Olson said that he was going to teach Brozo a lesson by reducing Brozo's commission on the Fingerhut deal. A few days after the fishing trip, Olson sent an e-mail message to his supervisor, Mike Rosser, in which he recommended that Brozo's commission for the Fingerhut deal be reduced. Thereafter, Oracle made a retroactive "manual" adjustment and reduced Brozo's earned commissions by $604,249 for fiscal year 1999.

Oracle introduced evidence to show that Brozo did not do as much work on the Fingerhut transaction as he claimed. Because the Fingerhut deal was a single transaction that clearly had generated a quota credit greater than Brozo's annual quota, Senior Vice President Mary Anne Gillespie "flagged" it as requiring review. Based on her observations of Brozo's contribution and on recommendations she received from Brozo's supervisors, Gillespie decided that the appropriate treatment was to cap Brozo's total quota credits for fiscal year 1999 at 200% of his pro-rated annual quota, thereby still allowing him to earn almost $420,000 for his eight months of employment with Oracle during fiscal year 1999.

Prior to the submission of the case to the jury, Oracle requested that the district court include the following jury instructions: (1) "[w]hether or not commissions have in fact been 'earned' depends upon the particular, unique requirements of the employer's policy"; and (2) "[w]here a contract provides that an employer retains discretion to determine amounts payable under a compensation plan, that term is valid and enforceable." The district court declined to submit these proposed instructions to the jury. The jury returned a special verdict fording that Oracle had committed a

breach of contract resulting in damages to Brozo in the amount of $604,249.00.

Oracle moved for judgment as a matter of law or, in the alternative, a new trial. In support of its motion for judgment as a matter of law, Oracle again maintained that the Plan unambiguously gave Oracle the discretion to implement a cap on Brozo's commissions for fiscal year 1999. Oracle further argued that, under Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 791 (8th Cir. 1996) (Vigoro). this discretionary business decision was beyond judicial review. Brozo moved for prejudgment interest, a statutory penalty, attorneys' fees and costs. The district court held a hearing on the pending motions on November 16, 2001. Thereafter, the district court entered a memorandum, opinion, and order denying Oracle's motion for judgment as a matter of law or for a new trial and granting Brozo's request for prejudgment interest, a statutory penalty, attorneys' fees, and costs. Brozo v. Oracle Corp., No. 00-751 (Dec. 28 2001) (memorandum opinion and order) (hereinafter "slip op.").

In denying Oracle's motion for judgment as a matter of law, the district court first rejected Oracle's renewed argument that the Plan unambiguously granted Oracle the discretion to review and revise Brozo's commissions.

The district court reasoned:

> The applicable language is ambiguous; it does not give to [Oracle] unfettered discretion to deduct or limit amounts otherwise payable under Oracle's incentive compensation plan. Oracle points to language giving it the "right to change the Plan at any time," (Sec. II A., Terms and Conditions), and the right to "determine the appropriate treatment of the transaction under the Plan." (Individualized Compensation Plan, Passage B.) In isolation, these

> words/phrases may appear unambiguous, but in the context of the Individualized Compensation Plan and the Terms and Conditions, the urged interpretation simply makes no sense. Without regard to the trial testimony (which clearly contradicted Oracle's interpretation), Oracle's construction would convert what is clearly an employment contract into nothing more than a "we'll pay you whatever we want" and "we'll let you know our decision whenever we want - even at the end of the fiscal year when you - the employee - have performed up to expectations" arrangement.

Id. at 2.

The district court further rejected Oracle's argument based on Vigoro, commenting that Oracle "seem[ed] to be now guided (really misguided) by the language [in Vigoro. . . `When a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable. " Id at 3. The district court continued:

> The present case is not, however, one in which the contract terms leave to the "discretion of one party" the how, when and under what circumstances to pay an employee for performance. In Vigoro, the incentive compensation plan permitted the employer to "deduct `amounts Management deems appropriate as a penalty for mismanagement . . . ." In exercising its rights under this provision, management "decided that [the employee] deserved no incentive bonus in a year in which he breached his duty of loyalty by soliciting employees and customers to join him in a competing venture." That type of employee misconduct will be penalized almost anywhere. Clearly the facts of Vigoro render the holding there

inapplicable here. The documents here have no standards to be employed and are not limited to misconduct such as occurred in Vigoro.

Id at 3 (emphasis original) (internal citations omitted).

Following the district court's entry of final judgment in favor of Brozo, Oracle appealed.

Discussion

Oracle argues that the district court erred in holding that the Plan is ambiguous. We review *de novo* the question of whether or not contract language is ambiguous. See, e.g., Barry v. Barry, 78 F.3d 375, 382 (8th Cir. 1996). A contract is ambiguous if it is reasonably susceptible to more than one interpretation, considering the context in which the words are used and giving them their plain and ordinary meaning. See id. At this stage, we must decide whether or not the Plan is ambiguous without considering extrinsic evidence, the jury's decision, or our own views of how the contract could have been written or performed more fairly. See, e.g., Federal Deposit Insur. Corp. v. Hartford Accid. & Indem. Co., 97 F.3d 1148,1151 (8th Cir. 1996) ("A court must not impose its own concept of fairness under the guise of construing a contract.")

Brozo argues that the lack of specificity in the Plan as to when a commission is earned and whether the Plan allows for capping commissions renders the Plan ambiguous. For example, Brozo argues, the phrase "appropriate treatment of the transaction under the Plan" in Part II.B. of the Plan is never defined and, therefore, it is unclear whether capping a commission can be such appropriate treatment - especially when the Plan *expressly* allows capping of a "Milestone Bonus." As to the reference to a company vice president's authority to review a single transaction for which the quota

credits exceed the salesperson's annual quota, Brozo argues that this does not unambiguously give the officer the authority to change the amount of the commission but, rather, could also simply mean that the vice president may "review[] an earned commission to ensure that all the I's are dotted and T's are crossed before the commission is paid." Brief for Appellee at 29. Brozo also contends that the Plan interpretation urged by Oracle is draconian, would render almost the entire agreement superfluous, and simply does not make sense. Under well-established rules of contract interpretation, Brozo continues, a contract will not be read so as to lead to a harsh or absurd result. Brozo also emphasizes that Oracle asked him to sign an amended version of the Plan for fiscal year 1999 which would have expressly capped his commissions at 200% of his annual goal. Then, in fiscal year 2000, Oracle amended the Plan documents to cap every salesperson's total annual commissions at 200% of his or her annual goal. Neither of these actions would have been necessary, Brozo suggests, if the language in the original Plan did indeed clearly and unambiguously give Oracle the right to retroactively impose such a cap on any salesperson's commissions at any time prior to payment.

There is no dispute that the Plan represents an arms-length agreement between Oracle and Brozo regarding the terms and conditions by which Brozo's incentive compensation would be determined. As noted above, Part II.A. of the Plan sets forth the following language:

> The Company shall make the final and binding determination of any amount payable under the Plan and reserves the right to change the Plan at any time, during or after the close of the fiscal year. Changes may be to salaries, bonuses, commissions, commission rates, quotas, territories or any other terms and conditions. Changes to the Plan are valid only if approved at the Vice President level or higher

> in accordance with Sales Planning practices. Entitlement to commissions and bonuses does not vest until the Company makes any and all final changes as authorized by the Plan.

Addendum to Brief for Appellant at 19 (Defendant's Exhibit 101) (Fiscal Year 1999 Oracle Americas Compensation Plan, License Sales Terms and Conditions).

> Part II.B. of the Plan adds:
>
> For any single transaction that generates Quota Credit equal to or greater than the salesperson's annual quota, management at the Vice President level or higher will review the transaction and determine the appropriate treatment of the transaction under the Plan.

Id.

At the hearing on the parties' post-trial motions, the district court indicated its view that the phrase "appropriate treatment" in Part II.B. in the Plan was ambiguous. See Appellant's Appendix at 35 (Transcript of hearing on Nov. 16, 2001) (referring to the phrase "appropriate treatment," the district court stated: "I don't know what that means. I really don't. To me it could mean a lot of things. . . . I don't read that to say you can then, basically after the fact, do anything you want with a commission. And as long as you are doing it for some `business reason' or at least not fraudulently ... that it's okay."). In the written order that followed, the district court reasoned that, while it might appear that this and other language in the Plan unambiguously permitted Oracle to make the challenged adjustment to Brozo's commissions, that interpretation "makes no sense" in the context of the overall contract because it "would convert what is clearly an employment contract into nothing more than a `we'll pay you whatever we want' and `we'll let you know our decision

whenever we want to-even at the end of the fiscal year when you the employee-have performed up to expectations' arrangement." Slip op. at 2. We disagree.

In the present case, the Plan unambiguously delegated to Oracle, acting through its officers at the vice president level and higher, the discretionary authority to decide upon "appropriate treatment . . . under the Plan" whenever a single transaction generated for Brozo a quota credit equal to or greater than his annual quota. Therefore, the need for a precise definition of words "appropriate treatment ... under the Plan" was plainly obviated by the fact that the determination of what that might be was left to Oracle's sole discretion. The Plan need not (nor could not) specify every possible form of "appropriate treatment" for every qualifying situation. Moreover, the delegation of discretionary authority is no less clear because the Plan expressly mentions some, but not all, possible forms of appropriate treatment (e.g., a cap on bonus) or because Oracle subsequently attempted to add an express cap on commissions to the Plan.

"When a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable. *At most*, courts will step in `when the party who would assume the role of sole arbiter is charged with fraud, bad faith, or a grossly mistaken exercise of judgment.'" Vigoro, 82 F.3d at 785 (emphasis added) (citing Arrant v. Kidde, Inc., 756 F.2d 685,.868 (8th Cir. 1985) (per curiam), and quoting Golden v. Kentile Floors. Inc., 512 F.2d 838, 847 (5TH Cir. 1975)). Under our precedents, therefore, the district court was constrained from intervening in Oracle's business decision absent sufficient evidence of fraud, bad faith, or gross mistake of judgment. This is not to suggest that Oracle had a completely unfettered right to pay Brozo whatever it wanted, whenever it wanted, regardless of Brozo's performance; it is to say, however, that, although Oracle's decision might have been unfair, it may nevertheless be out of

our reach. Moreover, while it is clear that the facts in the present case are different from the facts in Vigoro - because, for example, the plaintiff in Vigoro had engaged in employee disloyalty - such factual differences do not diminish the applicability of Vigoro's rule generally precluding judicial review of a discretionary business decision made pursuant to an unambiguous contractual delegation of discretionary decision-making authority. Rather, such factual considerations weigh into the analysis of whether or not the business decision involved bad faith, fraud, or a gross mistake of judgment. See Vigoro, 82 F.3d 785 ("In this case, Vigoro's management decided that Crisp deserved no incentive bonus in a year in which he breached his duty of loyalty. . . . This cannot be called a bad faith or grossly mistaken exercise of judgment.").

In the district court, in response to Oracle's motion for judgment as a matter of law, Brozo distinguished the present case from Vigoro and argued that Vigoro therefore does not apply. Brozo did not argue, however, that Oracle had engaged in fraud, bad faith, or a grossly mistaken exercise of judgment within the meaning of Vigoro. Brozo argues for the first time on appeal that Oracle's actions amounted to a fraud, bad faith, or a gross mistake of judgment. He argues:

> Oracle claims that under the Vigoro standard, Brozo cannot show that it acted fraudulently, in bad faith, or committed any gross[ly mistaken] exercise in judgment. Oracle's argument conveniently ignores evidence presented at trial suggesting otherwise, including the fact that Reed Olson recommended that Brozo's commission be capped to "punish" him and "teach him a lesson" or that Brozo was the only [sales representative] at Oracle to be "capped."

Brief for Appellee at 38 n.10.

"We consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result." Orr v. Wal-Mart Stores. Inc., 297 F.3d 720, 725 (8th Cir. 2002). .Brozo's argument is not a purely legal one because it requires a factual finding that Oracle did engage in fraud, bad faith, or a grossly mistaken exercise of judgment. Moreover, no manifest injustice would result from our treating it as waived because Brozo's only viable argument is that Oracle acted in bad faith, and Minnesota does not recognize an implied duty of good faith and fair dealing in employment contracts. See Hunt v. IBM Mid. Am. Employees Fed. Credit Union, 384 N.W. 2d 853, 858 (Minn. 1986) ("[W]e have not read an implied covenant of good faith and fair dealing into employment contracts."); Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606, 613 (Minn. Ct. App.) ("Minnesota law ... does not recognize implied covenants of good faith and fair dealing in employment contracts."), cert. denied, 519 U.S. 870 (1996).

In sum, we hold that the Plan unambigiously gave Oracle the discretion to reduce Brozo's commissions for fiscal year 1999 and that, under Vigoro, judicial review of Oracle's discretionary decision is not warranted The district court erred in denying Oracle's motion for judgment as a matter of law.

Conclusion

For the reasons stated, we reverse the district court's denial of Oracle's motion for judgment as a matter of law. We vacate the jury's verdict and remand the case to the district court for further proceedings consistent with this opinion.[1]

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[1] Accordingly, we do not consider Oracle's challenge to the district court's jury instructions.

LAY, Circuit Judge, dissenting.

I dissent to point out the blatant error in the majority's interpretation of the contract. The test of whether a contract is ambiguous, thus allowing extrinsic evidence to be admitted before a jury as the trial court did here, or whether the contract is unambiguous as the majority fords, turns on whether reasonable minds might differ as to the meaning of the terms of the contract. In the present case, the district court was privy to all of the evidence and heard the arguments of both sides whether the contract was ambiguous. To urge that the district court acted unreasonably ignores the express language of the entire contract as well as the district court's comments and findings. In interpreting the contract, the majority has substituted a twisted version of what the contract means without considering the plain wording embodied within the contract. Although the majority gives lip service to the fact that the contract expressly provides that only bonuses may be capped, it gives little meaning to this significant language. There is no language in the contract that says a commission, after it has been earned, may be capped. The fact that the contract provides only for bonuses to be capped and not commissions is given little or no weight by the majority. This in itself is significant error. The majority has found a way to cap Brozo's commission by taking language in the contract completely out of context.

There are other legal concerns surrounding the construction of the contract by the majority. First, the majority failed to take into consideration all of the facts and circumstances, including the conduct of the parties, surrounding the contract and the reliance that the parties have placed upon it. See Restatement Second of Contracts § 202; see also 11 Richard A. Lord, Williston on Contracts § 32:2, at 402 (4th ed. 200Q). Second, the majority has failed to give a

coherent and consistent meaning to all terms in the contract. See Lord, supra, at § 32:3, at 408. Third, the majority overlooks that the ultimate interpretation of the contract should be reasonable and not arbitrary or capricious and should reflect a just result. See id § 32:11 (stating "interpretations which render the contract fair and reasonable are preferred to those which render the contract harsh or unreasonable to one party"). In the present case, the majority has ignored these principles. The majority's opinion states that an employer can change a employee's compensation after the employee's work is completed and the compensation is earned. I challenge the majority to find any way. As the district court observed, Oracle's interpretation of the contract now adopted by the majority makes "no sense." Even if we assume the contract is not ambiguous, the majority overlooks that when Brozo was hired, he was presented a copy of a Standard Individual Compensation Plan which reflected a cap on bonuses but not on commissions. The majority ignores the terms of compensation within the contract as to when an employee earns a commission; the contract provides that Brozo's compensation expressly depended upon the credits that were earned and there is a specific provision of the contract that states the credits are earned upon "booking" or "revenue recognition." The majority overlooks Section IV of the contract which provides that certain revenues, such as license revenues, would be earned 100 percent upon "revenue recognition" and when this occurred, Oracle's revenue recognition department "recognized" the revenue as a guaranteed receivable. The contract provides in terms, completely ignored by the majority, that other credits for education, renewals, or consulting were earned 100 percent upon "booking of the sale." Notwithstanding this express language, the majority approves the capping of Brozo's commission after the sale, even though the commission had already been earned. Thus, the majority ignores the express language of the contract and fashions a result which completely contradicts the express terms of the contract.

The majority relies upon language of paragraphs A and B of Section II of the contract which provides as follows:

> A. The Company shall make the final and binding determination of any amount payable under the Plan and reserves the right to change the Plan at any time, during or after the close of the fiscal year. Changes may be to salaries, bonuses, commissions. commission rates. quotas, territories or any other terms and conditions. Changes to the Plan are valid only if approved at the Vice President level or higher in accordance with Sales Planning practices. Entitlement to commissions and bonuses does not vest until the Company makes any and all final changes as authorized by the Plan.
>
> B. For any single transaction that generates Quota Credit equal to or greater than the salesperson's annual quota, management at the Vice President level or higher will review the transaction and determine the appropriate treatment of the transaction under the Plan.

Add. 19 (emphasis added).

By singling out one sentence in the above contract, the majority contradicts the other express terms of the contract which guarantee a commission once earned. In doing so, the majority slights the principle that the meaning of words in a contract depends upon the words around it. Lord, supra, at § 32:6, at 432-34; see also Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (stating a contract term is "known by the company it keeps"). Oracle uses this language, as does

the majority, to mean that a commission can be retroactively capped notwithstanding the simplicity of the contract which says only bonuses can be capped,[2] and that the commission is deemed earned upon the sale.

The extrinsic evidence heard by the jury demonstrates the absurdity of the majority's interpretation of the contract. In June of 1999, prior to Oracle's unauthorized capping of the commission, Oracle attempted to amend the Individual Compensation Plan and submitted it to Brozo for his signature capping his commission at 200 percent. Brozo refused to sign the amended Plan. Oracle officials conceded that the employee's signature to amend the Plan was required for a retroactive adjustment.[3]

I respectfully submit that the learned district court accurately refuted Oracle's argument by the following statement:

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[2] The jury heard testimony that Brozo's supervisor, Reed Olson, decided to punish Brozo and reduce his commission on the Finger Hut deal because Brozo had played a practical joke on him on a fishing trip. Thus, Brozo's earned commission of $630,000 was capped at $183,589.

[3] The majority overlooks Minnesota law which controls an interpretation of the contract. Under Minnesota. law, the legislature has provided: "When an employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon the demand of the employee." Minn. Stat. § 181.13. To urge as the majority does, that the contract between Brozo and Oracle provides Oracle the discretion to retroactively reduce the compensation, borders upon the ridiculous.

> [Oracle's] construction [of the Plan] would convert what is clearly an employment contract into nothing more than a "we'll pay you whatever we want" and "we'll let you know our decision whenever we want to-even at the end of the fiscal year when you the employee-have performed up to expectations" arrangement.

Add. 2.

One of the cardinal principles of contract construction is that every contract should be interpreted to provide a lawful and legal meaning. Lord, supra, at § 32:11, at 453. If Oracle is correct in its argument, which the majority has sanctioned, they have turned this agreement into an illusory contract meaning that there is no contract at all. In other words, if Brozo is committed to a performance Plan, to say that his employer may act within its sole discretion to do whatever it wants to do, renders the contract illusory. See Family Snacks of North Carolina. Inc. v. Prepared Products Co.. Inc., 295 F.3d 864, 867-68 (8th Cir. 2002) (restating the common law contract principle that both parties must be obligated to perform under a contract); Heuser v. Kephart, 215 F.3d 1186, 1191 (10th Cir. 2000) (holding a contract illusory because city officials had unfettered discretion to accept or reject a settlement offer); Gray v. American Express Co., 743 F.2d 10, 19 (D.C. Cir. 1984) (holding that a contract between a credit card company and card holder did not allow the credit card company to revoke the credit card after charges had already accrued because such a contract would be illusory); 3 Lord, supra, at § 7:7, at 88-89 (stating a promise which allows one party to escape performance of anything detrimental to himself or beneficial to the promisee is illusory).

Another reasonable interpretation of Section II which Oracle relies upon demonstrates that it is susceptible to other meanings. The majority overlooked the fact that Section II,

which says changes may be made to commissions, etc., is predicated upon Oracle's power and right to change the Plan. There is nothing within the plain meaning of Section II. A which gives the employer the right to retroactively alter a single earned commission.[4] Oracle changed the Plan for fiscal year 2000, specifically capping salespersons' quotas at 200 percent. Oracle, however, did nothing to "change the Plan" prior to its attempt to retroactively cap Brozo's commissions. None of the documents were amended or altered. Instead, Oracle simply attempted to change a single commission on a retroactive basis. Clearly the contract does not provide for such unilateral conduct. As Brozo points out, such an interpretation would render every other part of the Plan meaningless.

The majority also overlooks another basic standard governing the construction of a. contract: the court must construe the agreement against the drafter. 11 Lord, supra, at § 32:12, at 472. Oracle respectfully submitted the majority's twisted version of the contract complied with the general principle of contract interpretation, as well as the evidence of the record. A contract should not be construed so strictly as to lead to a harsh or absurd result. Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lode of Hallock, Minn., 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969).

It is also clear that the conduct of the parties contradicted Oracle's interpretation of the Plan. As the district court pointed out, if Oracle so clearly had the right to "cap" Brozo's earned commission, they never would have prepared a new agreement for Brozo to sign to add capping

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[4] This contract had never been interpreted by Oracle in the manner that the majority asserts at any time during its existence.

language to the Plan for fiscal year 2000.[5] In the present case, the Plan, provides that commissions are earned "upon booking" or "upon revenue recognition." I set forth this proviso at the beginning of this dissent. These terms are completely ignored by the majority. In addition, the majority ignores Section II of the contract which states that Oracle must act "as authorized by the Plan" and determine appropriate treatment "under the Plan." Add. 19 (emphasis added).

I strongly endorse the district court's reasonable interpretation of the contract where it correctly noted "[t]he present case is not ... one in which the contract terms leave to the `discretion of one party' the how, when and under what circumstances to pay an employee for performance." Add. 3.

In conclusion, I once again assert that there is no reported case of which I am aware that provides an employer has unrestricted discretion to retroactively change a commission once earned when there is no express provision in the contract providing for it. Any employee would be a fool to enter into such a contract. This not only points out a total absence of reasonableness in the majority's interpretation, but also singles out how unjust and nonsensical its interpretation appears to be.

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[5] The majority relies upon the case of Vigoro Indus., Inc. v. Crisp, 82 F.3d 785 (8th Cir. 1996). In doing so, it takes language out of context in holding that Vigoro stands for the proposition that "[w]hen a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable." Vigoro, 82 F.3d at 791. Vigoro, of course, is clearly distinguishable. The employee's bonus could be reduced by the expressive terms of the contract if management deemed it "appropriate as a penalty for mismanagement." Id.

This case troubles me as much as any case that I have sat on in over thirty-seven years on this court. In the present case, the law is clear. There can be little doubt that the district court exercised a reasonable interpretation to the contract and correctly submitted the case to the jury. In writing this dissent, I recognize that it is a strong one; however, as I have indicated, to deny a party a commission properly earned under the express terms of a contract in the manner the majority has attempted to do in this case, requires strong words and a strong objection. I accordingly strongly dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1309

Richard B. Brozo,	*	
	*	
	*	
Appellee,	*	Order Denying Petition for
	*	Rehearing and for Rehearing
v.	*	En Banc
	*	
Oracle Corporation,	*	
a Delaware corporation,	*	
	*	
Appellant.		

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Melloy would grant the petition for rehearing en banc.

Lay, Circuit Judge, dissenting.

I respectfully dissent from the denial of the petition for panel rehearing.

The statutes of the State of Minnesota set out the public policy of the state. It is a basic principle of federalism that federal courts no longer apply federal substantive law. We are bound to apply in diversity cases state law and state legal policy. The confusion arises here in that it was several days after Brozo earned his commission that Oracle Corporation attempted to amend its Plan. For this court to now hold that Oracle may amend its Plan at any time and

apply the amended Plan on a retroactive basis, totally ignores Minnesota law.

Minnesota law sets forth: "When an employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon the demand of the employee." Minn. Stat. § 181.13. See Brown v. Tonka Corp., 519 N.W.2d 474,477 (Minn. Ct. App. 1994); see also Holman v. CPT Corp., 457 N.W.2d 740, 743 (Minn. Ct. App. 1990); Tynan v. KSTP, Inc., 247 Minn. 168, 177, 77 N.W.2d 200, 206 (1956).

Minnesota law is undisputed that once a commission is earned, it cannot later be changed retroactively. The majority opinion holds that as a matter of law the amendment to the Plan was unambiguous under Minnesota law. But this amendment took place after the commission was earned. As an alternative basis, the plaintiff appellant pled Count I in the plaintiff's complaint that a commission cannot be retroactively changed under Minnesota law. For this court to now alter a commission on a retroactive basis, after the commission has been earned, is not only totally unjust, but ignores the landmark decision of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The majority holding constitutes fundamental error and should be reversed.

Since the majority refuses to apply the law at the time of the transaction, it has, for the first time since Erie, ignored a landmark case of the Supreme Court of the United States and has refused to apply state law. This is fundamental error.

I have no vote on the petition for rehearing en bane. I recommend that the court grant the petition for rehearing en bane. As things stand now, the majority's holding is inexplicable.

June 24, 2003

Order Entered at the Direction of the Court:

S/_____
Michael E Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Richard B. Brozo,

Plaintiff,

vs.

Civil No. 00-751 (RHK/JMM)
MEMORANDUM OPINION AND ORDER

Oracle Corporation, a Delaware corporation,

Defendant.

James H. Kaster and Steven Andrew Smith, Nichols, Kaster & Anderson, PLLP, Minneapolis, Minnesota, for Plaintiff.

Daniel L. Palmquist and Joel E. Abrahamson, Leonard, Street and Deinard, P.A., Minneapolis, Minnesota, for Defendant.

The above matter was tried before the undersigned and a jury on October 9-11, 2001. The jury's verdict, in the form of answers to interrogatories, was returned on October 12, 2001. By that verdict, the jury determined that Defendant Oracle Corporation had breached its employment contract with Plaintiff Brozo and awarded Brozo $604,249 in damages.

Now before the Court are the parties' post-trial motions. Oracle seeks judgment as a matter of law or, in the alternative, a new trial. Brozo seeks prejudgment interest, a statutory penalty, attorney's fees, and costs. Oracle's Motion will be denied; Brozo's will be granted.

A. **Judgment as a Matter of Law**

Judgment as a matter of law is appropriate when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party. . . ." Fed. R. Civ. P. 50(a). In this case, the Court determined, when denying cross-motions for summary judgment, that the applicable contract language governing the earning and payment of commissions was ambiguous. That determination was based on the Court's reading of the two documents constituting the contract and the specific language contained therein. Nothing has been presented to the Court since its initial determination to alter the undersigned's reading of the contract provisions. The applicable language is ambiguous; it does not give to the Defendant unfettered discretion to deduct or limit amounts otherwise payable under Oracle's incentive compensation plan. Oracle points to language giving it the "right to change the Plan at any time," (Sec. II. A., Terms and Conditions), and the right to "determine the appropriate treatment of the transaction under the Plan."

(Individualized Compensation Plan, Passage B.) In isolation, these words/phrases may appear unambiguous, but in the context of the Individualized Compensation Plan and the Terms and Conditions, the urged interpretation simply makes no sense. Without regard to the trial testimony (which clearly contradicted Defendant's interpretation), Defendant's construction would convert what is clearly an employment contract into nothing more than a "we'll pay you whatever we want" and "we'll let you know our decision whenever we want to-even at the end of the fiscal year when you-the employee-have performed up to expectations" arrangement.

Defendant seems to be now guided (really misguided) by the language of the Eighth Circuit in Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 791 (8th Cir.1996) where Judge Loken stated "When a contract teen leaves a decision to the discretion of one party, that decision is virtually unreviewable." No one quarrels with that language-not the Plaintiff and not this Court. The present case is not, however, one in which the contract terms leave to the "discretion of one party" the how, when and under what circumstances to pay an employee for performance. In Vigoro, the incentive compensation plan permitted the employer to "deduct `amounts Management deems appropriate as a penalty for mismanagement . . . .' " Id. In exercising its rights under this provision, management "decided that [the employee] deserved no incentive bonus in a year in which he breached his duty of loyalty by soliciting employees and, customers to join him in a competing venture." Id. (emphasis added). That type of employee misconduct will be penalized almost anywhere. Clearly the facts in Vigoro render the holding there inapplicable here. The documents here have no standards to be employed and are not limited to misconduct such as occurred in Vigoro.

The contract language here is ambiguous and that ambiguity was properly submitted to the jury for resolution.

The jury was instructed as follows:

> The dispute in this case requires your interpretation of the "contract" between Mr. Brozo and Oracle. The contract in this case is comprised of two documents, Defendant's exhibits 100 and 101 or Plaintiff's exhibits 1 and 2.....

Jury Instruction No. 8.

Contract Breach

A contract is breached when there is a failure without legal justification to perform all or any substantial part of what is promised in a contract.

This breach occurs when one party fails to carry out part of the contract that requires immediate performance.

In this case, Mr. Brozo's position is that the contract between himself and Oracle called for the payment of commissions in accordance with an established schedule and that the contract did not permit Oracle to alter, revise, or cap the commission otherwise owing to Mr. Brozo.

Oracle's position is that the contract between itself and Mr. Brozo permitted Oracle to alter, revise, or cap the commission otherwise owing to Mr. Brozo.

It is not disputed that Oracle did "cap" the commission owing to Mr. Brozo. If you determine that the contract permitted Oracle to cap the commission, then there has been no breach of the contract and you must answer "no" to question No. 2 on the special verdict form.

If you determine that the contract did not permit Oracle to "cap" Mr. Brow's commission then there has been a breach of the contract and you must answer "yes" to question No. 2 on the special verdict form.

Jury Instruction No. 9. The Motion to enter judgment as a matter of law in favor of Defendant will be denied.

B. **New Trial**

1. Oracle's Motion for a New Trial

When deciding a motion for a new trial, the Court's primary concern is to prevent the verdict from working an injustice. Leichihman v. Pickwick, Int'l, 814 F.2d 1263, 1266 (8th Cir.1987), cert. denied, 484 U.S. 855 (1987). In other words, "[t]he court must be motivated by more than the fact that it would have come to a different conclusion had it been the trier of fact. The court must feel that the jury reached a seriously erroneous result in spite of the clear weight of the evidence." Id. Accordingly, the standard is whether the verdict is against the weight of the evidence. Id. at 1267. In assessing a new trial motion, the Court may consider all the evidence adduced at trial and weigh that evidence for itself. Id. at 1266.

Oracle first contends that the Court's refusal to allow Christian Facey, Senior Director of Global Sales Planning and Compensation at Oracle, to testify as to the purpose of Section II of the Fiscal Year 1999 Oracle America's License Sales Terms and Conditions ("Terms and Conditions") deprived Oracle of a fair trial. At trial, however, Facey did testify as to Oracle's interpretation of Section II and how that section fit within the overall compensation plan at Oracle. Mary Ann Gillespie, a Senior Vice-President at Oracle, as well as other Oracle employees, also testified about what Oracle understood Section II to mean. The Court concludes that Oracle was given sufficient opportunity to explain the purpose of Section II of the Terms and Conditions.

Oracle next contends that Brozo violated the Court's pretrial Order, which in part provided that Brozo was "precluded from arguing that he neither saw nor was presented with" the Terms and Conditions of his contract, and that such violation deprived Oracle of a fair trial. Oracle

contends that during Brozo's opening statement, Plaintiff's counsel stated that Brozo had never seen the Terms and Conditions of his contract with Oracle. Oracle further contends that Brozo himself testified that he had not seen the Terms and Conditions of his contract with Oracle. Oracle argues that these statements "poisoned, the minds of the jurors with the unfounded notion that Plaintiff should not be bound by the Terms and Conditions because Plaintiff never received the Terms and Conditions." (Defendant's Mem. in Supp. of its Mot. for J. as a Matter of Law or a New Trial, p. 9.) In this case, the jury was clearly instructed that the "contract" between Oracle and Brozo consisted of both the Terms and Conditions and the Fiscal Year 1999 Oracle America's Compensation Plan ("Personal Compensation Plan"). (Jury Instruction No. 8.) Additionally, in closing arguments, counsel for both Plaintiff and Defendant argued as to what the Terms and Conditions meant and not whether they applied. There simply was no violation of the Court's pretrial ruling.

Oracle also contends that the Court's failure to give Defendant's Proposed Jury Instruction No. 17 deprived it of a fair trial. Defendant's Proposed Jury Instruction No. 17 provided: "where a contract provides that the employer retains discretion to determine amounts payable under a compensation plan, that term is valid and enforceable." In determining whether the Court committed an error in failing to submit a proposed instruction to the jury, the Court looks to see "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." Karcher v. Emerson Electric Co., 94 F.3d 502, S 14 (8th Cir.1996). Oracle argues that because of the lack of this instruction "the jury was not equipped to assess the validity of the Contract at issue." (Defendant's Mem. in Sapp. of Mot. for J. as a Matter of Law, p.10). The validity of the contract provision,

however, was never in issue in this case and the jury was instructed as such. Jury Instruction No. 8 provided in part:

> The dispute in this case requires your interpretation of the "contract" between Mr. Brozo and Oracle. The contract in this case is comprised of two documents, Defendant's exhibits 100 and 101 or Plaintiff s exhibits 1 and 2.
>
> You should interpret the contract so as to give effect and meaning to all language in the contract.

(Jury Instruction No. 8.) There was no error in failing to submit the proposed instruction to the jury.

Finally, Oracle contends that Plaintiff's counsel's "contact" with a juror on the second day of trial deprived Oracle of a fair trial. The Court, with approval of counsel, conducted an in camera examination in which the juror informed the Court that, although she had seen counsel on the street the previous night, she had not heard anything they had said. The Court concluded that there was no juror contact, and certainly no improper juror contact. This asserted ground for a new trial is without merit.

In conclusion, the Court concludes that the issue of whether there was a breach of the employment agreement was properly submitted to the jury. The manner of that submission was agreed to by the parties. The jury's verdict is fully supported by the evidence and will stand.

2. **Brozo's Motion for Prejudgment Interest**

Brozo bas petitioned the Court for $85,687.47 in prejudgment interest. Minn. Stat. § 549.09 provides for prejudgment interest to be computed from the time of the

commencement of the action or when a written demand is made "[e]xcept as otherwise provided by contract or allowed by law." Minn. Stat. § 549.09, sub d. 1 (b). The statute left in place the common law method of computing liquidated interest as it "supplemented, but did not replace, the existing common law allowing prejudgment interest." Trapp v. Hancuh, 587 N.W.2d 61, 63 (Minn. Ct. App. 1998) (citing ICC Leasing Corp. v. Midwestern Mach. Co., 257 N.W.2d 551, 556 (Minn. 1997)).

Brozo contends that he is owed prejudgment interest from the day his commission was due, June 1, 1999, because the amount was clearly liquidated and readily ascertainable as of the date it was due. Oracle, basing its position on Minn. Stat. § 549.09, contends that Brozo's claim did not arise until February 18, 2001, 24 hours after Brozo made a written demand for payment of the commission.

Prejudgment interest from the time the claim arises is appropriate when the amount demanded can be ascertained by computation or reference to generally recognized standards and does not depend on a contingency. Jostens, Inc. v. CNA Ins., Continental Cas. Co., 336 N.W.2d 544, 546 (Minn. 1983). In this case, Brozo's commission is readily ascertainable by reference to the Personal Compensation Plan. Prejudgment interest, therefore, began to accrue on June 1, 1999.

The prejudgment interest statute provides that interest is computed as simple interest per annum, based on a bank-discounted secondary market yield of one-year treasury bills. Minn. Stat. § 549.09, sub d. 1 (e). Prejudgment interest shall be computed at the following rates: for the period from June 1 through December 31, 1999-4%, for the period from January 1 through December 31, 2000-5%, and for the period from January 1 through October 12, 2001-6%. The Court, therefore, awards Brozo $73,218.72 in prejudgment interest.

3. Brozo's Motion for a Statutory Penalty

Brozo also moves for a statutory penalty under Minn. Stat. § 181.14, sub d. 2, arguing that in calculating the penalty, the Court should consider both his salary and hiscommissions. Oracle contends that Brozo has miscalculated the penalty by considering the commissions that he was paid in addition to his salary.

Under Minn. Stat. § 181.14, sub d. 2, after an employee resigns, an employer who fails to pay wages or commissions within 24 hours after a demand "shall be liable to the employee for an additional sum equal to the amount of the employee's average daily earnings provided in the contract of employment, for every day, not to exceed 15 days in all, until such payment or other settlement satisfactory to the employee is made." (Emphasis added.) Brozo argues that his "average daily earnings" should be calculated by taking his commissions and salary into account. Oracle, however, argues that the commissions are not part of the "average daily earnings.

Minn. Stat. § 181.14 clearly provides for the payment of a penalty in a case where an employee is paid solely on commission. In such a case, the penalty would be based on the employee's commissions for the year. This case is no different. The contract at issue clearly provided for the payment of commissions as part of Brozo's compensation. Brozo is entitled to a statutory penalty which takes his commissions into account. The Court, therefore, awards Brozo a statutory penalty of $54,170.40.

4. Brozo's Motion for Attorney's Fees

"[S]tate law governs the availability of attorney fees in diversity cases where no conflicting federal statute or court rule applies." Burlington Northern R. Co. v. Farmers Union Oil Co. of Rolla, 207 F.3d 526, 534 (8th Cir. 2000). Under Minn. Stat. § 181.171, "the court shall order an employer who is found to have committed a violation of [Minn. Stat. § 181.14] to pay the aggrieved party reasonable costs, disbursements, witness fees, and attorney fees."

The starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, what is commonly referred to as the "lodestar figure." The number of hours and rates submitted by plaintiff s counsel is the departure point for the Court's analysis of the present attorney's fees request.

In this case, Plaintiff requests $202,660 in attorney's fees, based upon 929.3 hours of professional services. Of that time, 302.3 hours were billed by James Kaster, lead counsel for Brozo, at the rate of $350 an hour, totaling $105,805 in attorney's fees. Oracle contends that Kaster's rate is unreasonable and suggests that an hourly rate of $280 would be more appropriate.

In determining a reasonable hourly rate, the Court looks to the prevailing market rate in the community in which the litigation is situated, specifically at the prevailing rate for similar legal services performed by attorneys of comparable skill, experience, and reputation. McDonald v. Armontrout, 860 F.2d 1456, 1458 (8th Cir.1988). Plaintiff has provided the Court with an affidavit of Lawrence R. Altman, a Minneapolis litigator, who specializes in the area of employment law, who opines that Kaster's rate of $350 is "well within the range of billing rates for [an attorney of his]

experience in the field of employment law in the Minneapolis-St. Paul metropolitan area." (Affidavit of Steven Andrew Smith116, Exh. G.) Oracle, on the other hand, has provided the Court with three affidavits, from Robert J. Huber, a shareholder at Leonard, Street and Deinard, who specializes in the area of construction litigation, Robert L. Demay, a shareholder at Leonard, Street and Deinard, who specializes in complex commercial litigation, and Ann Huntrods, an attorney at Briggs and Morgan, who specializes in employment law, each stating that their personal billing rate is between $280 and $295 an hour, but failing to address whether Kaster's rate is reasonable. The Court finds that Kaster's rate is reasonable for the Minneapolis-St Paul legal market and that the hours expended by Kaster and other associates with him on the litigation were likewise reasonable. The Court will award attorney's fees in the requested amount of $202,660.

5. Brozo's Motion for Costs

Brozo seeks to recover $48,100.86 as the cost of bringing this action under Minn. Stat § 181.171, which entitles a plaintiff to recover all reasonable costs, disbursements, and witness fees. Oracle contends that a number of items requested are not reimbursable and that Brozo's motion for costs is premature.

In diversity actions, the allowance of costs is a procedural matter and state law in and of itself is not controlling. Glassman Const. Co., Inc. v. Maryland Plaza, inc., 371 F. Supp.1154,1162 (D. Md.1974). Instead, Federal Rule of Civil Procedure 54(d) is applicable in this action, and, therefore, Plaintiff is entitled to costs under it and not Minn. Stat. § 181.171. Federal Rule 54(d) provides that costs, other than attorney's fees, shall be allowed as a matter of course to the prevailing party. The term "costs" is further defined in 28 U.S.C. § 1920, which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920. Federal courts are bound by the foregoing and are not given discretion to impose additional items as costs without explicit statutory authorization. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). Oracle objects to six different items identified as costs by Brozo. Each item will be addressed in turn.

First, Oracle contends that Brozo should only be reimbursed for photocopying charges directly connected with exhibits used at trial. The statute is not that limited, however, and allows for all photocopies that were obtained for use in the case. 28 U.S.C. § 1920(4). This would include photocopies that were used during depositions and photocopies of briefs for the court. As Oracle does not contend that the photocopies were not for use in the case but only that they were not used at trial, the Court will allow the photocopying charges to be taxed against Oracle.

Second, Brozo seeks to recover $176.68 for postage charges. The statute does not anticipate the recovery of postage charges. The Court, therefore, has no authority to tax such items to Oracle and those charges will be excluded from the final calculation of costs.

Third, Brozo seeks to recover $1,934.70 for services rendered by JW Claim Investigations. Again, 28 U.S.C. § 1920 does not authorize the Court to tax this item to Oracle and it will be excluded from the final calculation of costs.

Fourth, 28 U.S.C. § 1821 limits the amount the Court may award for expert fees. "[F]ederal courts have no authority to award expert witness fees in excess of the statutory limit set by Congress . . ." Crawford, 482 U.S. at 443. Brozo, however, requests $22,931.34 for expert witness fees. Having no authority to tax this item to Oracle, the Court awards Brozo the sum of $40 for Neil Lapidus's one day of trial testimony.

Fifth Brozo seeks reimbursement for an expenditure of $7,875.25 to the National Jury Project. Again the statute does not anticipate such a charge, and it will be excluded from the final calculation of costs.

Pursuant to the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED:

1. Defendant's Motion for Judgment as a Matter of Law and Alternative Motion for New Trial (Doc. No. 61) is **DENIED;**

2. Plaintiff' s Motion for Prejudgment Interest, Civil Penalty, Attorney's Fees and Costs (Doc. No. 63) is **GRANTED** and Plaintiff is awarded the sums set forth below:

(a) prejudgment interest in the amount of $73,218.72;

(b) a statutory penalty in the amount of $54,170.40;

(c) attorney's fees in the amount of $202,660.00; and

(d) costs in the amount of $8,037.27.

3. Upon payment of the foregoing, together with the monetary the judgment ($604,249.00) entered on October 17, 2001, the Complaint herein will be **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 28, 2001

S/_____
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA
CIVIL NOTICE

DATE MAILED TO COUNSEL/PRO SE PARTIES:

The purpose of this notice is to summarize the time limits for fling with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the time limits for filing a Notice of Appeal review the applicable federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R Civ. P. 59; or

3. Thirty days (6o days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make Additional findings of fact

under Fed. R Civ. P. 52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Richard B. Brozo — Case No. Civil 00-751 RHK/JMM

v. — **JUDGMENT IN A CIVIL CASE**

Oracle Corporation, a Delaware corporation

(X) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff recover of the defendant the sum of $604,249 and his costs of the action.

DATE: October 17, 2001

S/_____
Richard H. Kyle, Judge
U.S. District Court

RICHARD D. SLETTEN, CLERK

S/_____
Denise La Fond, Deputy Clerk

OFFICE OF THE ATTORNEY GENERAL

STATE OF MINNESOTA
ST. PAUL 55155
April 28,2003

MIKE HATCH
ATTORNEY GENERAL

Clerk of Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street, Suite 24.329
St. Louis, MO 63102

Re: Richard Brozo v. Oracle Corporation
Appellate Court File No. 02-1309

Dear Clerk of Court:

This letter is sent in support of appellees' Petition for En Banc or Panel Rehearing in the above matter. The interest of this office in the matter is based upon the Court's construction of Minnesota contract law and the potential effect of that construction on employment contracts throughout the state.

The case presents important issues worthy of rehearing. Numerous Minnesota laws require payment to employees of wages earned. *See, e.g.*, Minn. Stat. §§ 181.08; 181.10, 181.101, 181.13, 181:14 and 181.15 (2002). At the heart of these laws is the simple principle that, having agreed

to exchange his labor for compensation, an employee who has performed the agreed upon task should not find payment of his earned compensation held hostage to an employer's whims. Having performed as promised, a worker should be paid as promised. The Court's holding has the potential for significant damage to this statutory framework.

The Court concluded that the employment contract unambiguously delegated to Oracle the discretion to fix compensation after the work upon which it was based had been completed. *Brozo v. Oracle Corp.*, 324 F.3d 661 (8th Cir. 2003). In so holding, the Court made no reference to Minnesota law. We believe several of the following Minnesota laws are applicable to the contract that appears to be ignored in the Court's opinion.

First, the Court's decision relies upon *Vigoro Indus., Inc, v. Crisp*, 82 F.3d 785, 791 (8th Cir. 1996) for the proposition that a contract delegating a decision to one party is essentially unreviewable except on the basis of fraud, bad faith, or grossly mistaken exercise in exercise of judgment by that party. *Brozo*, 324 F.3d at 667. In fact, Minnesota courts have frequently reviewed contracts on standards other than fraud, bad faith, or grossly mistaken exercise in judgment. *See Atwater Creamery Co. v. Western Nat'l Mutual Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (examining whether the parties were of unequal bargaining power); *Schmidt v. Midwest Family Mut. Ins. Co.*, 413 N.W.2d 178 (Minn. App. 1987) (invalidating exercise of a contract. provision as against public policy); *see also Osgood v. Medical, Inc.*, 415 N.W.2d 896 (Minn. App. 1987) (noting that courts, pursuant to Minnesota statutes, will examine contracts on the basis of unconscionability, conspicuousness, failure of essential purpose).

Second, the Court interpreted the employment contract o provide that the employer could charge the

employee's compensation after it is earned. Minnesota law does not favor contracts, or contractual interpretation, that violate state law or public policy. *Swenson v. Management Recruiter Int'l, Inc.*, 872 F.2d 264, 267 (8th Cir.), *cert. denied,* 493 U.S. 848, 110 S. Ct. 143 (1989); *First Nat'l Bank of Baron v. Strimling, et al.*, 308 Minn., 207, 241 N.W.2d. 478, 481 (1976). Minnesota public policy is that, once the compensation is earned by the employees, the employer must pay it. Minn. Stat. §§ 181.08, 181.10, 181.101, 181.13, 181.14 and 181.15 (2002).

Third, the reservation of complete discretion on the part of one party, as interpreted by the majority, negates any promise on the part of the offeror. Minnesota law interprets contract terms in the context of the entire contract and does so in such a way as to give meaning to all of its provisions. *Brookfield Trade Center Inc. v. County of Ramsey,* 584 N.W.2d 390, 394 (Minn. 1998). A valid contract "must be certain in terms and not so indefinite and illusory as to make it impossible to say just what is promised." Anderson v. Backlund, 159 Minn. 432, 425,199 N.W. 90, 91 (1924). The *Brozo* majority's interpretation of the reservation clause makes it impossible . for the person in the inferior bargaining position to ever say what was promised. Of course, since the affected party can never say what was promised, they could never enforce the promise. Thus, an employee could never ask a court to enforce the promise, whether the promise is for wages, benefits or some other consideration. This has disturbing and far-reaching consequences for Minnesota employees.

Finally, in applying Arkansas law to a Minnesota dispute, the Court ignored the principle that interpretation of contracts is ordinarily a question of state law. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995).

For all the reasons set out above, we support appellees' petition for either panel review or rehearing en banc.

Respectfully submitted,

S/_____
MIKE HATCH
Attorney General
State of Minnesota

TITLE 28 -- JUDICIARY AND JUDICIAL PROCEDURE

PART V -- PROCEDURE

CHAPTER 111 -- GENERAL PROVISIONS

Sec. 1652 State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat.944.)